No. 16-16533

(Before the Honorable Milan D. Smith, Jr., and Sandra S. Ikuta, Circuit Judges, and John D. Bates, District Judge;
Opinion filed July 19, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD ROSS,

Petitioner-Appellant,

v.

WILLIAMS, Warden; ATTORNEY GENERAL OF THE STATE OF NEVADA, et al.

Respondents-Appellees.

Appeal from the United States District Court
for the District of Nevada (Las Vegas)
District Court Case No. 2:14-cv-01527-JCM-PAL,
Hon. James C. Mahan

Petition for Rehearing and Rehearing En Banc

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STATEMENT IN SUPPORT OF REHEARING OR REHEARING EN BANC

Ronald Ross's ability to pursue habeas relief has been extinguished by a mere technical pleading deficiency. The panel majority's restrictive relation-back rule relies on a faulty legal premise that will lead, as it does here, to unfair results. There are more equitable and legally supportable alternatives, including the dissent's liberal construction approach. And yet, even under the panel majority's new rule, Ross is entitled to relief as the panel majority overlooked an outcome-determinative fact. This case demands to be reheard.

The situation here occurs regularly. Ross filed a timely, but poorly pleaded *pro se* petition, which listed several discrete ineffective assistance of counsel claims, yet contained no operative facts within the four corners of the petition. He attached as an exhibit a reasoned state court decision that provided the facts underlying several of those ineffectiveness claims. After his AEDPA time had expired,[1] counsel was appointed to file an amended petition. Among the claims raised in the

[1] The panel majority left this pertinent fact out of the opinion.

amended petition were the same ineffectiveness claims in the original petition and decided upon in the attached state court decision.

The narrow question here is whether claims in an amended petition may relate back to operative facts in a state court decision attached to the original *pro se* petition.

In a two-to-one opinion, the panel majority held a petitioner cannot relate back to operative facts in an exhibit attached to an original petition unless the exhibit was explicitly incorporated into the original petition through "clear and repeated" references to the exhibit within the petition. *Ross v. Williams*, 896 F.3d 958, 967 (9th Cir. 2018) (attached). In contrast, the dissenting judge believed the court should liberally construe Ross's original *pro se* petition and read it as setting out the facts discussed in the attached state court decision. *Id.* at 973 (Bates, D.J., dissenting).

Preliminarily, Ross was entitled to relief because the panel majority overlooked a highly relevant fact. In a "Request for Filing and Stay" filed with the original petition, Ross made a clear attempt to incorporate, stating, "Petitioner incorporates by reference and fact, the attached affidavit in support of this motion, and writ, with attached exhibits."

This should be enough for a *pro se* litigant to meet the panel majority's new rule.

But even if this overlooked fact does not satisfy the panel majority's rule, their holding is predicated on an erroneous legal premise and should be reheard. As the dissent pointed out, the panel majority's fundamental mistake is to conflate pleading requirements with relation back principles. The petition here was not dismissed for being insufficiently pleaded; rather, the question here is relation back. The pleading requirements under Habeas Rule 2 and relation back under Fed. R. Civ. P. 15(c) are different concepts that serve different purposes. A petition might violate Habeas Rule 2 while sufficiently support relation back under Civil Rule 15(c). As the dissent argues, an attached state court decision is enough to provide fair notice of the operative facts of claims set forth in a petition for relation back purposes.

Just as important, procedural requirements in federal court are not supposed to trap the unwary *pro se* petitioner. But the panel-majority's rule does just that. This rule elevates a hyper-technical incorporation requirement—which doesn't appear in the habeas rules or the rules of civil procedure—above the fair administration of justice for *pro se*

litigants. *See* Fed. R. Civ. P. 1. It will invariably trap *pro se* petitioners who, like Ross, have filed a readily discernible *pro se* petition with discrete legal claims and illuminating exhibits, but who did not include the talismanic incorporation words in the petition. Such a petition will be treated the same as if no petition had been filed at all. That contradicts the purpose of procedural rules.

In contrast, the dissent's approach is practical and correctly applies the relation-back doctrine: courts have the authority to liberally construe an original *pro se* pleading to determine, at the very least, what a petitioner attempted to plead for relation back purposes. This approach is not only just and mindful of the realities of *pro se* litigation, but it follows Supreme Court precedent, which, as recently as the final day of this past term, has reminded lower courts that *pro se* pleadings, particularly at the motion to dismiss stage, need to be liberally construed. *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam).

Alternatively, Fed. R. Civ. P 10(c) provides a workable rules-based solution. One provision of this rule states a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Utilizing this provision, Ross proposes the following rule: if a petitioner

articulates discrete legal grounds in a petition, an attached "written instrument"—such as a reasoned state-court decision—can supplement the operative facts of the pleaded grounds for relation back purposes. This rule is consistent with the habeas rules, would cause no prejudice to the State, and would not trap an unwary *pro se* litigant.

The panel-majority's opinion should be reconsidered, if necessary by an *en banc* panel, due to the issue's exceptional importance and the unfairness that will occur under the panel majority's rule. *See* FRAP 35(b)(1)(B). Ross's petition stands dismissed, even though he timely pleaded, and gave fair notice of, discrete legal claims. But his case is far from an isolated situation. The panel majority's rule will have a deleterious impact on countless *pro se* litigants. Their rule does exactly what procedural rules should not do: it makes pleading a "game of skill in which one misstep may be decisive." *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986). Furthermore, the panel majority overlooked relevant facts and its holding does not find justification in any rule or prior precedent. *See* FRAP 35(b)(1)(A). It should be reheard.

ARGUMENT

I. The panel majority's opinion is based on faulty logic, and its hyper-technical holding—unmoored from the language of any rule—will invariably trap unwary *pro se* litigants

The panel majority justified its hyper-technical "clear and repeated" references rule as follows: because Habeas Rule 2(c) places a strict pleading requirement on habeas petitioners and Rule 2(d) requires a petitioner to complete a standard form, *pro se* petitioners must plead the operative facts within the four corners of the form to avail themselves of relation back. *Ross*, 896 F.3d at 965-66. According to the panel majority, the only "exception" to these pleading requirements is when a petitioner has made "clear and repeated references" within the form to an attached exhibit that asserts the claim with "sufficient particularity." *Id.* at 966 (citing *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005) (*per curiam*)).

The panel majority's hyper-technical rule is wrong as it relies on a faulty premise. As the dissent pointed out, the panel majority conflated two distinct inquiries: pleading requirements and relation back. However, the sufficiency of Ross's original petition under Habeas Rule 2 is not at issue here. The real question is whether, under Civil Rule 15(c), a properly pleaded amended petition related back to an original *pro se*

petition with discernible, but arguably insufficiently pleaded, legal claims. As the dissent explained:

> This distinction matters because **Civil Rule 15(c) requires less for relation back than Habeas Rule 2 requires to survive dismissal**. Civil Rule 15(c) is satisfied if the original petition "set[s] out"—or even "attempt[s]" to set out—the factual basis for the amendment's claims. Habeas Rule 2, by contrast, requires that the petition's claims be pleaded with "particularity," a standard that the Supreme Court has called "demanding." *Mayle* [*v. Felix*], 545 U.S. [644,] 655 [(2005)]. This differential makes sense, because the two doctrines serve different purposes. Habeas Rule 2's pleading standard seeks to discourage "lengthy and often illegible petitions" that require "hours [to] decipher[ ]," as well as petitions "contain[ing] mere conclusions of law, unsupported by any facts." *See* Habeas Rule 2 advisory committee's note. But **relation back simply ensures that the respondent has fair notice of what the petitioner might later assert in an amendment to his petition.** *See Anthony* [*v. Cambra*], 236 F.3d [568,] 576 [(9th Cir. 2000)].

Ross, 896 F.3d at 976–77 (Bates, D.J., dissenting) (emphasis added).

This is the major flaw in the panel majority's premise: under Civil Rule 15(c), the availability of relation back does not depend on the sufficiency of the original pleading. A petition might violate Habeas Rule 2 while do enough to support relation back under Civil Rule 15(c). As the

dissent argues, an attached state court decision that supplements the discrete grounds in a petition is enough to provide fair notice of the operative facts for relation back purposes.

The panel majority believed the Supreme Court's decision in *Mayle* supported its use of Habeas Rule 2 to narrow relation back principles in the habeas context. However, this is an unjustifiedly broad reading of *Mayle*. In *Mayle*, the Supreme Court looked to the heightened pleading requirements of Rule 2 to determine the scope of the term "conduct, transaction, or occurrence" in Civil Rule 15(c). *Mayle*, 545 U.S. at 655-56. The Court believed that, because of Rule 2, legal claims in a § 2254 petition would have to be pleaded "discretely." *Id.* at 661. This view of Rule 2 limited the scope of what qualified as an "occurrence" for relation back. *Id.*

That was the extent of the Court's reliance on Habeas Rule 2. Nowhere in *Mayle* did the Court limit how relation back under Civil Rule 15(c) would apply to a habeas petition. Nor did the Court say that relation back would operate any differently in habeas cases than it would in a typical civil case. Specifically, the Court did not indicate that the words "set out" and "attempt to set out" in Civil Rule 15(c) would be any

different in the habeas context. Indeed, it would be illogical for the Court to do that as it would severely limit a district court's power, envisioned under Habeas Rule 4, to allow a *pro se* petitioner to file an amended petition to fix pleading deficiencies. *See* Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts Advisory Committee Notes to 1976 Adoption (advising Rule 4 is flexible and allows for alternatives less than dismissal, such as seeking ways to have petitioner make petition "more certain.").

There is simply nothing in *Mayle* to support the panel majority's sweeping use of Habeas Rule 2 to greatly restrict relation back for habeas petitioners.

Additionally, procedural requirements in federal court are not supposed to trap the unwary *pro se* petitioner. *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). But the panel majority's holding will do just that.

In the first instance, a hyper-technical "clear and repeated" reference requirement does not appear in Habeas Rule 2 or in any rule of civil procedure. *See*, *e.g.*, Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."). It is difficult to see how a *pro se* prisoner can

be expected to comply with a hyper-technical requirement if it cannot even be located in a rule. *Cf. Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (Tashima, J., concurring) ("A prisoner acting pro se can be prevented from discovering the most basic procedural rules essential to avoid being summarily thrown out of court. . . .").

Similarly, *Dye* does not support such a requirement. In *Dye* the Supreme Court concluded in a *per curium* summary reversal that a petitioner had sufficiently pleaded a legal claim under Civil Rules 10(c) because he had incorporated an attached legal brief into the petition. *Dye*, 546 U.S. at 4. Contrary to the panel majority's analysis, the Court wasn't creating an "exception" in *Dye*; it was engaging in a straightforward application of Civil Rule 10(c) in a summary reversal. *See EEOC v.* FLRA, 476 U.S. 19, 26, n.5 (1986) (Stevens, J., dissenting) (summary dispositions customarily reserved for settled areas of law). Although the Court pointed out that the petitioner had made "clear and repeated" references to the brief, the Court was not saying Civil Rule 10(c) applies only when a petitioner makes "clear and repeated" references. It could not do this without rewriting the rule. Rather, the

Court was saying nothing more than the "clear and repeated" references had met the rule, not that it was the only way to do it.

Beyond this, the local form and its instructions would tend to trap a petitioner into believing he would have no need to comply with the panel majority's hyper-technical incorporation requirement, at least for state court decisions. Paragraph 7 of the instructions forbids any exhibits.[2] The paragraph then commands a petitioner to attach the state court decisions. A *pro se* petitioner could easily read these two opposing commands as an indication the state court decisions are not viewed as exhibits that need to be incorporated, but as required parts of the petition itself. The form itself can lead a *pro se* petitioner to also rely on an attached opinion for factual support as the form allows to include additional pages to provide supporting facts. For a petitioner like Ross, who needed to work quickly due to fears of missing the deadline (*see* Excerpts of Record ("EOR") 31-33), listing discrete legal claims in the

[2] The form can be found at the district court's website. https://www.nvd.uscourts.gov/wp-content/uploads/2017/08/2254-Habeas-Petition-NOT-Sentenced-to-Death-Packet.pdf.

petition and relying on the facts from an attached state court decision is not unreasonable.

While it is true the intent of AEDPA was to limit a petitioner's ability to obtain habeas relief, this Court has ensured the statute of limitations is not applied in a way that would be procedurally unfair to the petitioner. *See Calderon v. U.S. Dist. Court for the Cent. Dist. Of Cal. (Beeler)*, 128 F.3d 1283, 1287-88 (9th Cir. 1997) (one year period did not run until after AEDPA effective date, citing case which said to do otherwise would be "entirely unfair"; one-year period can be equitably tolled consistent with AEDPA's legislative history); *overruled on other grounds*, *Calderon v. U.S. Dist. Court for the Cent. Dist. Of Cal.(Kelly)*, 163 F.3d 530 (9th Cir. 1998).

But the unfairness here is palpable. Ross listed out concrete ineffectiveness claims in the petition. For example, one claim alleged counsel "failed to object to the State's use of expert witness." EOR 28. Indisputably, the attached state court opinion provided the operative facts for this claim. EOR 37 (counsel "fail[ed] to object to expert testimony pertaining to pickpockets and distraction thefts where the witness was not noticed as an expert"). Although the magic incorporation

words were not present, no reasonable person can deny this combination gave fair notice of this particular legal claim and its operative facts. *Cf. Scott v. Schriro*, 567 F.3d 573, 582-83 (9th Cir. 2009) (claims in appendix attached to petition for review provided fair notice of operative facts and law to state court for exhaustion).

Under these circumstances, there is no fair reason a petitioner should be prevented from relating an amended petition back to the original *pro se* petition and the attached state-court decision. But the panel majority's hyper-technical rule now extinguishes Ross's ability to pursue habeas relief on any of his timely-filed, easily discernible claims. That is contrary to the intended purpose of the procedural rules. *See Schiavone*, 477 U.S. at 27 ("principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the court"); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (merits review is not to be avoided on basis of "mere technicalities"). The opinion should be reheard.

II. The dissenting judge's liberal-construction analysis or Ross's rules-based approach are more equitable and legally justifiable.

The dissenting judge rejected the panel-majority's approach. Instead, he believed the court should liberally construe Ross's original *pro se* petition and read it as setting out the facts discussed in the attached state court decision. *Ross*, 896 F.3d at 973 (Bates, D.J., dissenting). He argued that, where the factual bases of Ross's legal claim were plain on the face of the attachment to his *pro se* petition, Ross's failure to explicitly incorporate those facts into his form petition was precisely the kind of "technical mistake" this Court has refused to hold against *pro se* petitioners. *Id.* at 975.

The dissent's approach is practical—district court judges know how to liberally construe *pro se* pleadings—and correctly applies the relation-back doctrine: courts have the authority to liberally construe an original *pro se* pleading to determine what a petitioner attempted to plead for relation back purposes. Indeed, only three weeks before the instant opinion, the Supreme Court reiterated in a *per curiam* summary reversal that federal courts must interpret *pro se* pleadings liberally in the context of a motion to dismiss. *Sause*, 138 S. Ct. at 2563. As the dissent points

out, this liberal construction rule applies with equal force in the habeas context, including liberally construing the *filing itself* so it favors the petitioner. *Ross*, 896 F.3d at 974.

Under these principles, the dissent appropriately concludes, "Where, as here, a state-court decision denying postconviction relief is attached as an exhibit to a *pro se* habeas petition and the petition lists claims that correspond to the claims addressed in that decision, principles of liberal construction require that the facts discussed in the decision be construed as 'set out' in the petition for purposes of relation back under Rule 15(c)." *Id.* at 975. It is a fair resolution, mindful of the complexities of *pro se* federal habeas litigation. *See generally Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998) (noting handicaps faced by prisoners acting pro se in complying with procedural requirements).

Alternatively, Fed. R. Civ. P 10(c) provides a workable rules-based solution. One provision of this rule states a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Utilizing this provision, Ross proposes this rule: if a petitioner articulates discrete legal grounds in a petition, an attached "written instrument," in

particular a state court reasoned opinion,[3] can supplement the operative facts of the pleaded ground for relation back purposes.

This rule is consistent with *Mayle* as it would limit relation back to those situations where discrete legal claims are pleaded in the petition. It would not provide a reprieve from the statute of limitations—the discrete legal claims still would need to be timely pleaded. Yet, unlike the panel majority's rule, it would not trap an unwary *pro se* litigant who insufficiently pleaded what are otherwise readily discernible legal claims.

Similarly, the rule proposed by Ross does not open the door to a wellspring of issues or ask a court to augment a petition. Relation back would be limited to the operative facts contained in an attached "written instrument," typically a reasoned state court opinion. And it would only include those facts that support a discrete legal ground set forth in the petition.

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[3] This Court has concluded that documents analogous to the state court opinion here qualify under this provision of Rule 10(c). *Hartman v. California Dept. of Corr. and Rehab.*, 707 F.3d 1114, 1124 (9th Cir. 2013).

There would also be no fear that a court would have to scan a limitless number of exhibits.[4] In fact, it would be the opposite. When faced with an insufficiently pleaded petition with several exhibits, the district court has the discretion under Habeas Rule 4 to summarily order the petitioner to file a sufficient pleading rather than review the exhibits. The relation-back burden is on the petitioner to identify which "written instrument" attached to the original petition provides the operative facts. A court would have to review only those exhibits.

In this regard, this proposed rule is consistent with the habeas rules. Contrary to the panel majority's focus on Habeas Rule 2, the relevant rule here is Habeas Rule 4. Rule 4 requires the district court to screen all petitions to determine whether a petitioner has sufficiently stated grounds for relief. Rule 4 commands the court to review "any attached exhibits" in making its determination. The advisory committee notes and the local form specifically identify state court opinions as

[4] To note, the panel majority's rule does not solve this concern. A petitioner could expressly incorporate a limitless number of exhibits into a pleading. Under its rule, the district court would be *required* to review that unbounded number of exhibits. To the contrary, petitioner's proposed rule would place a more practical limit on a court's review, limiting it to only those exhibits that qualify as a "written instrument."

relevant exhibits to consider. *See* Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts Advisory Committee Notes to 1976 Adoption.

As noted before, a court can order an amended pleading to fix deficiencies in the original petition. But this often creates a situation where relation back is necessary as the amended petition is filed outside the limitations period. To determine the timeliness of any claim in the amended petition, a court would simply be mirroring the same analysis it had conducted before under Rule 4: reviewing the original petition plus the exhibits, in particular a state court opinion, to determine whether a petitioner had sufficiently stated a claim for relief to which he could now relate back.

One final factor here is that neither this proposed rule nor the dissent's approach will cause any prejudice to the State. As the dissenting judge explained, "the state-court decision will in most cases neatly summarize the facts underlying [the exhausted] claims—and only those claims—that the district court can consider on habeas review." *Ross*, 896 F.3d at 975. Consistent with habeas principles, relation back

would be limited to those claims to which the State would have been notified—those that have been exhausted in state court.

III. Ross is entitled to relief under the panel majority's rule as the panel majority overlooked Ross's clear attempt at incorporation.

The panel majority also erred because it overlooked the relevant fact that Ross made a clear attempt to incorporate the state court decision. When he filed his federal petition, he also filed a "Request for Filing and Stay." *See* 2:14-cv-1527-JCM-PAL, ECF No. 1-1. Ross explained he was running out of time and acknowledged he was filing a "provisional[ ]" petition. *Id.* He requested leave to amend and appointment of counsel. *Id.* He stated, "Petitioner incorporates by reference and fact, the attached affidavit in support of this motion, and writ, with attached exhibits." *Id.* Liberally construing this pleading, as required, this should be enough for a *pro se* litigant to meet the panel majority's rule. He intended to incorporate. If such a statement is deemed insufficient, it further demonstrates the unfairness of the rule.

CONCLUSION

This case should be reconsidered or reheard *en banc*. After rehearing, the case should be remanded for the district court to

determine whether the claims in Ross's amended petition relate back to his original petition.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 40-1(a) because this brief contains 3852 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated this 1st day of October, 2018.

Respectfully submitted,

Rene L. Valladares
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I hereby certify that on October 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Arielle Blanck
An Employee of the
Federal Public Defender

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Signature of Attorney or Unrepresented Litigant: /s/ Jonathan M. Kirshbaum

Date: 10/1/2018

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